

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

PACIFIC LIGHTNET, INC.,

Complainant,

vs.

HAWAIIAN TELCOM, INC.,

Respondent.

DOCKET NO. 2006-0450

DECISION AND ORDER NO. 24124

Filed April 4, 2008  
At 9 o'clock A.M.

Karen Higashi  
Chief Clerk of the Commission

ATTEST: A True Copy  
KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii

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DEPT. OF COMMERCE AND  
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STATE OF HAWAII

BEFORE THE PUBLIC UTILITIES COMMISSION  
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PACIFIC LIGHTNET, INC.,	)	
	)	
Complainant,	)	Docket No. 2006-0450
	)	
vs.	)	Decision and Order No. 24124
	)	
HAWAIIAN TELCOM, INC.,	)	
	)	
Respondent.	)	
	)	

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DECISION AND ORDER

By this Decision and Order, the commission: (1) grants HAWAIIAN TELCOM, INC.'s ("Hawaiian Telcom") Motion to Dismiss Complaint, filed on January 24, 2007 ("Motion to Dismiss"); and (2) denies PACIFIC LIGHTNET, INC.'s ("PLNI") "Omnibus Cross-Motion: (1) To Require Hawaiian Telcom's Chief Financial Officer to Show Cause at a Commission Hearing Relating to Hawaiian Telcom's Refusal to Pay Pacific Lightnet's Undisputed Invoices or Face Sanctions; or (2) In the Alternative, to Grant Pacific Lightnet Immediate Leave to Depose Hawaiian Telcom's Chief Financial Officer and Any Other Appropriate Hawaiian Telcom Representatives Concerning Hawaiian Telcom's Motives for Refusing to Pay Pacific Lightnet's Undisputed Past Due Invoices; or (3) In the Alternative, (a) To Appoint a Third-Party Financial Expert, or Panel of Experts, Experienced in Telecom Issues, Bankruptcy, and Antitrust Matters to Initiate an Immediate Commission Investigation Into Hawaiian Telcom's Books and Records for the Purpose of Determining Whether Hawaiian Telcom's Refusal

to Pay Pacific Lightnet's Undisputed Past Due Invoices is Related Either to Hawaiian Telcom's Imminent Financial Impairment, or the Knowing and Intentional Violation of Commission Rules and Orders for an Improper Purpose, and (b) To assess Hawaiian Telcom for the Cost of Such Investigation; and II. Pacific Lightnet's Cross-Motion for Partial Summary Judgment as to Count III of the Complaint; and III. Pacific Lightnet's Opposition to Hawaiian Telcom's Motion to Dismiss Complaint," filed on January 31, 2007 ("Omnibus Cross-Motion").<sup>1</sup>

I.

Background

A.

PLNI's Formal Complaint

On November 14, 2006, PLNI filed a formal complaint with the commission ("Formal Complaint"), alleging the following four claims against Hawaiian Telcom:

1.

Violation of HAR § 6-80-51

HAR § 6-80-51 provides that "[t]elecommunications carriers shall reciprocally compensate each other for the costs associated with transporting and terminating telecommunications

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<sup>1</sup>The parties to this docket are PLNI, Hawaiian Telcom, and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party to all proceedings before the commission pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62. Because, however, the Consumer Advocate took a limited role in this docket, for ease of reference herein, only PLNI and Hawaiian Telcom will be referred to as the "Parties."

traffic on their respective networks." PLNI alleges that, from July 2006 to the present, PLNI has provided network termination services to Hawaiian Telcom by terminating calls from Hawaiian Telcom's customers to PLNI's customers; PLNI has invoiced Hawaiian Telcom for these services, totaling approximately \$1.2 million, but Hawaiian Telcom has failed to make payment on any of the invoices.

2.

Violation of HRS § 269-37

HRS § 269-37 provides:

The commission shall ensure that telecommunications carriers are compensated on a fair basis for termination of telecommunications services on each other's networks, taking into account, among other things, reasonable and necessary costs to each telecommunications carrier of providing the services in question. Telecommunications carriers may negotiate compensation arrangements, that may include "bill and keep", mutual and equal compensation, or any other reasonable division of revenues pending tariff access rates to be set by the commission. Upon failure of the negotiations, the commission shall determine the proper methodology and amount of compensation.

PLNI alleges that Hawaiian Telcom has violated HRS § 269-37 by failing to compensate PLNI for the termination of telecommunications services on PLNI's network.

3.

Violation of HAR § 6-80-49(8)

HAR § 6-80-49(8) provides:

The cost of constructing, operating, or maintaining any interconnecting network or facility shall be incurred by, and shared between, the interconnecting carriers on an equitable, cost-based basis.

PLNI alleges that, from June 2006 to the present, PLNI has provided interconnection facilities to Hawaiian Telcom in the form of inter-machine trunks connecting the Parties' networks at various points throughout the state, and that Hawaiian Telcom has failed to make payment for these services, which total \$337,637.47.

4.

Request for Investigation Pursuant to HAR § 6-61-71

According to PLNI, Hawaiian Telcom's arrearage with PLNI "is likely symptomatic of Hawaiian Telcom's delinquencies with other third-party vendors, and that such material beyond-term indebtedness is likely associated with the apparent cost overruns and publicly-reported operational difficulties Hawaiian Telcom has experienced ever since Hawaiian Telcom's cutover from Verizon's back-office systems on April 1, 2006."<sup>2</sup> PLNI requests the Commission to institute an immediate investigation to determine whether Hawaiian Telcom faces near-term financial impairment that will undermine its ability to continue operations.

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<sup>2</sup>Formal Complaint at 5.

In total, PLNI alleges damages in the Formal Complaint totaling \$1,579,008.56.

B.

Hawaiian Telcom's Motion to Dismiss

On January 24, 2007, Hawaiian Telcom filed its Motion to Dismiss, arguing that the Parties' dispute was subject to a valid and enforceable arbitration provision in the Telecommunication Facility Interconnection Agreement between GST Telecom Hawaii, Inc. ("GST") (the predecessor in interest to PLNI) and GTE Hawaiian Telephone Company Incorporated ("GTE") (a predecessor in interest to Hawaiian Telcom), approved in Decision and Order No. 15283, in Docket No. 96-0398 ("Interconnection Agreement").<sup>3</sup> Specifically, Part XXV of the First Agreement provides:

25.1 Alternative to Litigation. Except as provided under Section 252 of the Act with respect to the approval of this Agreement by the Commission, the Parties desire to resolve disputes arising out of this Agreement without litigation. Accordingly, except for action seeking a temporary restraining order or an injunction related to the purposes of this Agreement, or suit to compel compliance with this dispute resolution process, the Parties agree to use the following alternative dispute resolution procedure as their sole remedy with respect to any

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<sup>3</sup>The Interconnection Agreement was amended by the Parties several times. When PLNI filed its Formal Complaint, the Parties were operating under the fourth amended Interconnection Agreement, effective April 23, 2004, referred to herein as the "First Agreement." As discussed further below, the Parties entered into an "Amended, Extended and Restated Agreement by and between [PLNI] and [Hawaiian Telcom] for the State of Hawaii," effective June 20, 2007, referred to herein as the "Second Agreement."

controversy or claim arising out of or relating to this Agreement or its breach.

Hawaiian Telcom contends that commission precedent in Docket No. 03-0027 compels dismissal of the Formal Complaint. In that docket, PLNI filed a formal complaint against Hawaiian Telcom's predecessor, Verizon Hawaii Inc. ("Verizon"), alleging breach of contract and violations of HAR § 6-80-49(8) and Federal Communications Commission regulations.<sup>4</sup> Verizon moved to dismiss PLNI's complaint, citing the same arbitration clause set forth above, and commission precedent in Docket No. 96-0352.<sup>5</sup> By Order No. 20716, filed on December 18, 2003 ("Order No. 20716"), the commission granted Verizon's Motion to Dismiss, stating:

Part XXV of the Agreement requires PLNI and Verizon Hawaii to resolve any controversy or claim arising out of or relating to the Agreement, or any breach of the Agreement by using the alternative dispute resolution process set forth in the Agreement.

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<sup>4</sup>Filings and decisions in Docket Nos. 03-0027 and 96-0352 (discussed below) are addressed in detail in Hawaiian Telcom's Motion to Dismiss. The commission may also take official notice of its records in other proceedings pursuant to HAR § 6-61-48.

<sup>5</sup>In Docket No. 96-0352, Western Wireless Corporation ("WWC") moved to compel Verizon's predecessor, GTE, to implement arbitrated interconnection agreement rates. WWC also sought sanctions for GTE's alleged failure to comply with commission orders and rules. WWC cited violations of state and federal law as grounds for the commission's jurisdiction over the dispute. GTE opposed the motion, arguing that WWC was really attempting to bring a contractual dispute before the commission, in circumvention of the interconnection agreement between WWC and GTE that required them to arbitrate disputes. The commission agreed with GTE and denied WWC's motion, stating: "the dispute is essentially contractual and not a matter of regulatory compliance. WWC should first seek relief through the alternative dispute resolution process agreed to by the parties and set forth in the terms of the interconnection agreement." Order No. 16171, filed on January 23, 1998, in Docket No. 96-0352, at 4.

Upon review of the pleadings and arguments made by the Parties, the commission views PLNI's complaint as a "controversy or claim arising out of or relating to the Agreement or its breach," and is subject to the alternative dispute resolution procedures set forth in Part XXV of the Agreement. Accordingly, based on the plain reading of the Agreement and the applicable authorities cited by Verizon Hawaii, the commission concludes that Verizon Hawaii's Motion to Dismiss should be granted, and the Parties should engage in the alternative dispute resolution procedures described in the Agreement.<sup>6</sup>

Moreover, citing HRS § 658A-6(a), Hawaiian Telcom argues that there is a clear public policy in Hawaii to enforce arbitration provisions in contracts to encourage arbitration as a means of settling differences and thereby avoiding litigation. HRS § 658A-6(a) provides:

An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

In determining whether or not a dispute is subject to arbitration, Hawaiian Telcom asserts that two questions must be answered: "(1) whether an arbitration agreement exists between the parties; and (2) if so, whether the subject matter of the dispute is arbitrable under such agreement."<sup>7</sup> Hawaiian Telcom then argues that: (1) Part XXV of the First Agreement exists between the Parties, and that this provision requires the

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<sup>6</sup>Order No. 20716 at 4 (footnote omitted).

<sup>7</sup>Motion to Dismiss at 4-5 (quoting Koolau Radiology, Inc. v. Queen's Med. Ctr., 73 Haw. 433, 445, 834 P.2d 1294, 1300 (1992)).



Parties, as their "sole remedy," to submit disputes to arbitration; and (2) the claims for compensation for interconnection facilities in the Formal Complaint arise out of "[a] controversy or claim . . . relating to th[e] Agreement or its breach[.]"<sup>8</sup>

C.

PLNI's Omnibus Cross-Motion

PLNI's Omnibus Cross-Motion, filed on January 31, 2007, contains three parts. In Part I, PLNI makes several requests that the commission grant certain discovery relief to PLNI. For example, PLNI requests, among other things, that the commission: (i) order Hawaiian Telcom's Chief Financial Officer to show cause at a hearing as to Hawaiian Telcom's refusal to pay PLNI's invoices; or (ii) appoint a third-party financial expert, or panel of experts, to initiate an immediate commission investigation into Hawaiian Telcom's books and records. Generally, PLNI asserts this relief is necessary based on its belief that "Hawaiian Telcom's inexplicable refusal to pay [PLNI] relates either to problems of a financial or technical nature, or to an intentional and oppressive scheme to thwart effective competition in the State of Hawaii."<sup>9</sup>

In Part II of the Omnibus Cross-Motion, PLNI moves for partial summary judgment on Count III (Violation of HAR § 6-80-49(8)) of its Formal Complaint. Here, PLNI argues:

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<sup>8</sup>Id. at 6 (quoting First Agreement, Section 25.1).

<sup>9</sup>Omnibus Cross-Motion at 5-6; see also id. at 14.

Hawaiian Telcom's Answer ADMITS at answering paragraph 12 that it received interconnection facilities from [PLNI], as well as ADMITS at answering paragraphs 13 and 14 that Hawaiian Telcom did not dispute [PLNI's] submitted invoices relating thereto in the amount of \$337,637.47, as shown in Exhibits B-1 and B-2 to the Complaint.

In its unverified Answer at answering paragraph 14, however, Hawaiian Telcom wrongfully DENIES that it has failed to pay the invoices, but, not surprisingly, offers no proof of payment to support its allegation. [PLNI], on the other hand, confirms through the sworn Affidavit of Patrick Bustamante, that as of the date of this filing, [PLNI] has received no payment from Hawaiian Telcom relating to the invoices identified in Exhibits B-1 and B-2, and, further, that [PLNI] has received no payment from Hawaiian Telcom relating to the invoices issued subsequent to the date of the Complaint-which are attached to the Affidavit of Patrick Bustamante as Attachments 3 - 6. Even viewed "in the light most favorable" to Hawaiian Telcom, a payment has either been made or it hasn't-there is no in-between. In this case, despite the DENIAL to the contrary, Hawaiian Telcom has simply made no payment.<sup>10</sup>

Finally, in Part III of the Omnibus Cross-Motion, PLNI opposes Hawaiian Telcom's Motion to Dismiss. Citing Hawaii Medical Association v. Hawaii Medical Service Association, 113 Hawai'i 77, 148 P.3d 1179 (Haw. 2006), PLNI alleges that the Hawaii Supreme Court "unequivocally determined that oppressive and unfair behavior essentially exceeds the scope of arbitration agreements, which most certainly typifies the instant case."<sup>11</sup> In addition, PLNI argues that the First Agreement implements statutory obligations of regulated public utilities, which is why

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<sup>10</sup>Id. at 15-16 (footnote omitted).

<sup>11</sup>Id. at 17.

the commission must review and approve all interconnection agreements, and "why a knowing and intentional failure to pay rises to the level of a violation of law."<sup>12</sup> Furthermore, PLNI states that the arbitration clause in the First Agreement is for the resolution of "disputes" and there is no "dispute" to resolve. In this regard, PLNI maintains that Hawaiian Telcom does not claim that PLNI's invoices are inaccurate; Hawaiian Telcom is simply ignoring PLNI's invoices.<sup>13</sup>

D.

Hearing on Motion to Dismiss and Omnibus Cross-Motion

On August 30, 2007, the commission heard Hawaiian Telcom's Motion to Dismiss and PLNI's Omnibus Cross-Motion ("Motions").<sup>14</sup> At the hearing, for the first time, PLNI raised an argument regarding the effect of the Parties' Second Agreement, which was, at that time, recently approved by the commission in Docket No. 03-0197, and effective June 20, 2007.<sup>15</sup>

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<sup>12</sup>Id. at 21.

<sup>13</sup>See id.

<sup>14</sup>The commission initially set the Motions for hearing on March 16, 2007. At the request of the Parties to reschedule the hearing, the commission, among other things, removed the hearing from the commission's schedule, directed the Parties to enter into settlement discussions, and if those proved unsuccessful, to participate in nonbinding mediation pursuant to HRS § 269-15.6. The Parties mediated in June 2007, but were unable to resolve their disputes. The Parties then requested the commission to reset their Motions for hearing, at which point, the commission rescheduled the hearing to August 30, 2007.

<sup>15</sup>In Docket No. 03-0197, initiated on July 10, 2003, PLNI petitioned the commission for arbitration of certain rates, terms, and conditions for interconnection with Verizon pursuant to HAR §§ 6-80-6(2) and 6-80-53 and 47 U.S.C. § 252(b).

PLNI asserted that the Second Agreement applies to the dispute, and that the Second Agreement allows the Parties to litigate their claims. Specifically, regarding the application of the Second Agreement, PLNI pointed out that Section 1.3 of the Second Agreement provides:

This Agreement constitutes the entire agreement between the Parties on the subject matter hereof, and supersedes any prior or contemporaneous agreement, understanding, or representation, on the subject matter hereof, provided, however, notwithstanding any other provision of this Agreement or otherwise, this Agreement is an amendment, extension and restatement of the Parties' prior interconnection and resale agreement(s), if any, and, as such, this Agreement is not intended to be, nor shall it be construed to create, a novation or accord and satisfaction with respect to any prior interconnection or resale agreements and, accordingly, all monetary obligations of the Parties to one another under any prior interconnection or resale agreements shall remain in full force and effect and shall constitute monetary obligations of the Parties under this Agreement (provided, however, that nothing contained in this Agreement shall convert any claim or debt that would otherwise constitute a prepetition claim or debt in a bankruptcy case into a postpetition claim or debt). In connection with the foregoing, Hawaiian Telcom expressly reserves all of its

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By Decision and Order No. 23304, filed on March 15, 2007, the commission decided the remaining open issues in PLNI's petition for arbitration for a new interconnection agreement. The commission also ordered the Parties to incorporate the commission's resolution of the open issues into their proposed interconnection agreement and provide a draft within thirty days. On June 20, 2007, the commission issued Order No. 23500, which approved the conforming interconnection agreement that the Parties filed in accordance with Decision and Order No. 23304, and ordered the Parties to file their executed interconnection agreement within thirty days, with an effective date of June 20, 2007. On July 20, 2007, the Parties filed their executed "Amended, Extended and Restated Agreement by and between [PLNI] and [Hawaiian Telcom] for the State of Hawaii," referred to earlier as the Second Agreement, see supra note 3, effective June 20, 2007.

rights under the Bankruptcy Code and Applicable Law to seek or oppose any relief in respect of the assumption, assumption and assignment, or rejection of any interconnection or resale agreements between Hawaiian Telcom and PLNI.<sup>16</sup>

In addition, regarding dispute resolution, Section 14 of the Second Agreement provides:

14.1 Except as otherwise provided in this Agreement, any dispute between the Parties regarding the interpretation or enforcement of this Agreement or any of its terms shall be addressed by good faith negotiation between the Parties. To initiate such negotiation, a Party must provide to the other Party written notice of the dispute that includes both a detailed description of the dispute or alleged nonperformance and the name of an individual who will serve as the initiating Party's representative in the negotiation. The other Party shall have ten Business Days to designate its own representative in the negotiation. The Parties' representatives shall meet at least once within 45 days after the date of the initiating Party's written notice in an attempt to reach a good faith resolution of the dispute. Upon agreement, the Parties' representatives may utilize other alternative dispute resolution procedures such as private mediation to assist in the negotiations.

14.2 If the Parties have been unable to resolve the dispute within 45 days of the date of the initiating Party's written notice, either Party may pursue any remedies available to it under this Agreement, at law, in equity, or otherwise, including, but not limited to, instituting an appropriate proceeding before the Commission, the FCC, or a court of competent jurisdiction.<sup>17</sup>

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<sup>16</sup>Second Agreement, Section 1.3.

<sup>17</sup>Id. at Sections 14.1 and 14.2.

E.

Supplemental Briefing

Because PLNI's arguments regarding the Second Agreement were raised for the first time at the August 30, 2007 hearing, and were not addressed or disclosed in either of the Parties' filings, by letter dated September 7, 2007, the commission instructed the Parties to submit supplemental briefs on the following two issues:

1. Does the [Second] Agreement or the [First Agreement] apply to the commission's adjudication of the Parties' disputes and pending motions before the commission in Docket No. 2006-0450?
2. Assuming arguendo that the [Second] Agreement applies to the disputes before the commission in Docket No. 2006-0450, does it affect Hawaiian Telcom Inc.'s Motion to Dismiss Complaint, and if so, how?<sup>18</sup>

The Parties filed supplemental briefs on October 3, 2007, and reply briefs on October 12, 2007. The Parties' positions, as addressed in their supplemental briefs, are discussed below.

1.

Hawaiian Telcom's Supplemental Briefs

Hawaiian Telcom argues that applying the terms of the Second Agreement to disputes that arose under the terms of the First Agreement is unreasonable, as the substantive terms surrounding the dispute (separate and apart from the dispute

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<sup>18</sup>See Letter dated September 7, 2007, from the commission to the Parties.

resolution provision) differ. For example, Hawaiian Telcom claims that terms in the First Agreement relating to trunking arrangements and billing requirements, which are material to the present dispute, are different under the Second Agreement. Furthermore, in order to determine whether a monetary obligation existed, Hawaiian Telcom asserts that the commission would have to refer to the agreement under which the alleged monetary obligations arose -- the First Agreement. According to Hawaiian Telcom, "[t]his is clear from the pleadings in this case, all of which discuss the disputes with reference to the First Agreement, not the [Second] Agreement."<sup>19</sup>

Hawaiian Telcom additionally maintains that, by its terms, the Second Agreement does not apply to disputes that PLNI brought to the commission in 2006, or to the pending Motions. Hawaiian Telcom explains that, although the Parties generally recognized that the Second Agreement would supersede the First Agreement, they were careful to condition that effect by expressly noting that the Second Agreement did not act as an accord and satisfaction of the First Agreement. Hawaiian Telcom further states:

In order to ensure that after the effectiveness of the [Second] Agreement no party would claim that debts owed under the First Agreement were not actionable, the parties specified in Section 37.1 that they did not waive and expressly reserved the right to "collect debts owed to it under any prior interconnection or resale agreements."<sup>20</sup>

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<sup>19</sup>Hawaiian Telcom's Reply Brief, filed on October 12, 2007, at 3.

<sup>20</sup>Hawaiian Telcom's Supplemental Brief, filed on October 3, 2007, at 8 (quoting Second Agreement, Section 37.1(e)).

Moreover, Hawaiian Telcom contends that, even if the Second Agreement applies to the Parties' dispute, it has no effect on the Motion to Dismiss because PLNI failed to comply with the requirements of Section 14.1 of the Second Agreement, set forth above. Hawaiian Telcom noted that, after the hearing, PLNI sent a request to Hawaiian Telcom to negotiate its dispute pursuant to Section 14 of the Second Agreement. In its response, Hawaiian Telcom agreed to negotiate, pursuant to Section 14 of the Second Agreement, disputes that arose after the effective date of the Second Agreement, but declined to do so with respect to disputes that arose under the First Agreement. As to these disputes, Hawaiian Telcom contends that "under the terms of Section 14.1., even if the [Second] Agreement were to apply to the disputes that arose under the First Agreement, PLNI's complaint is premature and not properly before the Commission."<sup>21</sup>

2.

PLNI's Supplemental Briefs

Citing the language in Section 1.3 of the Second Agreement, PLNI first argues that, as an express "amendment, extension and restatement" of the First Agreement, the Second Agreement applies to the instant dispute. Moreover, PLNI maintains that the Second Agreement expressly extends its reach to "monetary obligations" existing under prior interconnection agreements. Because Hawaiian Telcom did not pay,

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<sup>21</sup>Id. at 10.



and did not dispute, PLNI's reciprocal compensation billings in any amount under the First Agreement, PLNI alleges that the past due balance owed to PLNI under the First Agreement "constitutes an absolute monetary obligation under the [Second] Agreement."<sup>22</sup>

PLNI notes that, at the August 30, 2007 hearing on the Motions, Hawaiian Telcom contended that the alleged past due balance is not a "monetary obligation" within the meaning of Section 1.3 because it was not reduced to a judgment and is otherwise disputed. In response, PLNI argues that Hawaiian Telcom never properly disputed PLNI's invoices under the terms of the First Agreement; in any event, a monetary obligation may exist irrespective of whether it has been reduced to a judgment, and there is no support in the First Agreement for Hawaiian Telcom's interpretation of "monetary obligation."

Regarding the effect of applying the Second Agreement to the Motion to Dismiss (the second issue for supplemental briefing), PLNI asserts: "If, assuming arguendo, the [Second] Agreement applies, Hawaiian Telcom's Motion to Dismiss must be denied."<sup>23</sup> According to PLNI, Hawaiian Telcom's Motion to Dismiss was premised solely on the existence of the arbitration clause in the First Agreement; however, that provision no longer exists, and was replaced by the dispute resolution provisions in Section 14 (cited above) in the Second Agreement.<sup>24</sup> Furthermore,

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<sup>22</sup>PLNI's Supplemental Brief, filed on October 3, 2007 ("PLNI's Supp. Brief"), at 4.

<sup>23</sup>Id. at 8.

<sup>24</sup>See id.

regarding Hawaiian Telcom's contention that PLNI did not comply with the notice requirements in Section 14.1 of the Second Agreement, PLNI states: "Without waiving its position that, given the parties' active settlement discussions concerning the subject matter of the dispute, additional formal notice of dispute in technical compliance with Section 14.1 was superfluous, [PLNI] provided the requisite formal notice of dispute on September 12, 2007[.]"<sup>25</sup>

PLNI also responds to Hawaiian Telcom's argument that the commission should not apply the Second Agreement to a dispute that arose under the terms of the First Agreement because the substantive terms surrounding the dispute differ in the agreements. PLNI states:

We agree that, to the extent a dispute somehow exists—despite [Hawaiian Telcom's] express waiver of its right to lodge a dispute—as between the [First] Agreement and [Second] Agreement, the [First] Agreement would govern the substance of the dispute, since the trunking and billing arrangements were established under the [First] Agreement.<sup>26</sup>

PLNI, however, disagrees with Hawaiian Telcom's contention that the substantive terms of the two agreements are different with respect to trunking and billing arrangements.<sup>27</sup>

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<sup>25</sup>Id. at 9.

<sup>26</sup>PLNI's Supplemental Reply Brief, filed on October 12, 2007 ("PLNI's Supp. Reply"), at 2.

<sup>27</sup>See id.

## II.

### Discussion

#### A.

##### Hawaiian Telcom's Motion to Dismiss

The issues for the commission's determination are those that the Parties were asked to supplementary brief -- namely: (1) Whether the First Agreement or the Second Agreement applies to the present dispute?; and (2) Assuming the Second Agreement applies, what effect, if any, does it have on Hawaiian Telcom's Motion to Dismiss? Because, however, the commission finds that the First Agreement applies to the adjudication of this docket, as explained below, the commission's analysis of the first issue follows, and it does not address the second issue.

#### 1.

##### The First Agreement Applies to This Dispute

#### a.

##### Federal and State Law Favor Arbitration

Whether an agreement to arbitrate governs a particular dispute is essentially a matter of contract interpretation. The commission examines the language in both the First Agreement and the Second Agreement in light of the strong policy in Hawaii in favor of arbitration. See Ueoka v. Szymanski, 107 Hawai'i 386, 395, 114 P.3d 892, 901 (Haw. 2005) ("This court has long recognized the strong public policy supporting Hawai'i's arbitration statutes as codified in HRS Chapter 658. We have stated that '[t]he proclaimed public policy . . . is to encourage

arbitration as a means of settling differences and thereby avoiding litigation.'") (italics in original); Tatibouet v. Ellsworth, 99 Hawai'i 226, 234, 54 P.3d 397, 405 (Haw. 2002) ("It is well settled that the legislature overwhelmingly favors arbitration as a means of dispute resolution."); Lee v. Heftel, 81 Hawai'i 1, 4, 911 P.2d 721, 724 (Haw. 1996) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]" . . . "[A]s with any contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.") (citations omitted).<sup>28</sup>

The commission also looks to federal law on arbitration because the First and Second Agreements are subject to the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. See, e.g., Verizon N.Y. Inc. v. Broadview Networks, Inc., 781 N.Y.S.2d 211 (N.Y.Sup. 2004) (applying the Federal Arbitration Act, 9 U.S.C. § 1 et seq., in a dispute involving the interpretation of an arbitration provision in an interconnection agreement). Moreover, Hawaii Courts have previously looked to federal authority for guidance in determining the arbitrability of disputes. See, e.g., Lee, 81 Hawai'i at 3, 911 P.2d at 723 ("when faced with a motion to compel arbitration, we look to federal authority for guidance.").

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<sup>28</sup>Moreover, as cited above, HRS § 658A-6(a) provides:

An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

Federal law on arbitration, like state law, strongly supports arbitration. See Nestle Waters North America, Inc. v. Bollman, 505 F.3d 498, 503 (6th Cir. 2007) (noting the large number of cases from the Supreme Court encouraging arbitration in a wide variety of contexts and emphasizing the federal policy in favor of arbitration); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

Here, the arbitration clause in the First Agreement is broadly worded, covering "any controversy or claim arising out of or relating to [the First] Agreement or its breach."<sup>29</sup> This is a "classically broad" arbitration clause. See Mehler v. Terminix Int'l Co., 205 F.3d 44, 49 (2d Cir. 2000) (holding that a clause providing for arbitration of "any controversy or claim . . . arising out of or relating to" the agreement is a "classically broad" arbitration clause); ADR/JB, Corp. v. MCY III, Inc., 299 F.Supp.2d 110, 114 (E.D.N.Y. 2004) ("An arbitration clause that contains the phrase 'any claim or controversy arising out of or relating to the agreement' is considered the paradigm of a broad clause.") (quotation omitted). Thus, the strong policy in favor of arbitration of this dispute is even stronger because the arbitration provision in the First Agreement is broad. See Clarendon Nat'l Ins. Co. v. Lan, 152 F.Supp.2d 506, 514 (S.D.N.Y. 2001) ("The strong policy in favor of arbitration is even stronger where the arbitration clause itself is a broad

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<sup>29</sup>First Agreement, Section 25.1.

clause that refers to arbitration of 'all disputes arising out of an agreement.'").

Stated differently, "where, as here, an arbitration clause is broadly written, only an express provision excluding a specific dispute, or the most forceful evidence of a purpose to exclude the claim from arbitration, will remove the dispute from consideration by the arbitrators." Watson Wyatt & Co. v. SBC Holdings, Inc., 513 F.3d 646, 650 (6th Cir. 2008) (quotations omitted); see also Nestle Waters, 505 F.3d at 503. As explained further below, the commission does not find in the language of the Second Agreement, an "express provision" excluding the Parties' present dispute from arbitration, or other "forceful evidence" of a purpose to do so.

b.

No Waiver of the Arbitration Provision

Despite the clear policy favoring arbitration, PLNI argues that the Second Agreement, Section 1.3, applies. It states in relevant part:

This Agreement constitutes the entire agreement between the Parties on the subject matter hereof, and supersedes any prior or contemporaneous agreement, understanding, or representation, on the subject matter hereof, provided, however, notwithstanding any other provision of this Agreement or otherwise, this Agreement is an amendment, extension and restatement of the Parties' prior interconnection and resale agreement(s), if any, and, as such, this Agreement is not intended to be, nor shall it be construed to create, a novation or accord and satisfaction with respect to any prior interconnection or resale agreements and, accordingly, all monetary obligations of the Parties to one

another under any prior interconnection or resale agreements shall remain in full force and effect and shall constitute monetary obligations of the Parties under this Agreement[.]<sup>30</sup>

Although this section states that the Second Agreement "supersedes any prior or contemporaneous agreement, understanding, or representation, on the subject matter hereof," the commission finds that, under the circumstances of this case, this language does not extinguish the First Agreement, and does not amount to a waiver of Hawaiian Telcom's right to enforce the arbitration clause under the First Agreement.

Language excluding certain disputes from arbitration must be clear and unambiguous or unmistakably clear. See Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 847 (2d Cir. 1987). The Hawaii Intermediate Court of Appeals has further stated that "a waiver of a right to arbitration will not be lightly inferred because of Hawai'i's public policy of encouraging arbitration as a means of settling differences." Shimote v. Vincent, 80 Hawai'i 96, 100, 905 P.2d 71, 75 (Haw. Ct. App. 1995).<sup>31</sup> Under these standards, the commission finds that the language in Section 1.3 of the Second Agreement fails to clearly and unambiguously evidence a waiver of the Parties' agreement to arbitrate in Section 25.1 of the First Agreement.

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<sup>30</sup>Second Agreement, Section 1.3.

<sup>31</sup>Indeed, a presumption exists in other states against a court's finding that a party has waived the right to compel arbitration. See, e.g., SouthTrust Bank v. Bowen, 959 So.2d 624, 633 (Ala. 2006).

To the contrary, Section 1.3 of the Second Agreement explicitly states that the Second Agreement does not constitute a novation or accord and satisfaction,<sup>32</sup> and it expressly preserves the enforceability of monetary obligations of the Parties under prior agreements.<sup>33</sup> These provisions belie an intent by the Parties to extinguish their agreement to arbitrate disputes arising under the First Agreement.

Accordingly, absent language in the Second Agreement that clearly and unmistakably rescinds the Parties' agreement to arbitrate disputes arising under the First Agreement, the commission finds that the arbitration agreement in the First Agreement survives and applies to this dispute.

As such, because the First Agreement applies to the Parties' dispute, Section 25.1 of that agreement requires the Parties to arbitrate. PLNI's allegations in this docket are substantially similar to its allegations in Docket No. 03-0027. Moreover, the current dispute implicates the same arbitration provision that was considered in Docket No. 03-0027. As acknowledged by the commission in Docket No. 03-0027, this arbitration provision is broadly worded to cover "any controversy

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<sup>32</sup>A novation means "[s]ubstitution of a new contract, debt, or obligation for an existing one, between the same or different parties . . . whereby the old debt is extinguished." Black's Law Dictionary, 1064 (6th ed. 1990). An accord and satisfaction is a "method of discharging a claim whereby the parties agree to give and accept something in settlement of the claim and perform the agreement . . . and it is a new contract substituted for an old contract which is thereby discharged[.]" Id. at 17.

<sup>33</sup>See also Second Agreement, Section 37.1(e) ("Notwithstanding anything to the contrary in this Agreement, neither Party waives, and each Party hereby expressly reserves, its rights: . . . (e) to collect debts owed to it under any prior interconnection or resale agreements.")



or claim arising out of or relating to [the First] Agreement or its breach." For these reasons, and given the clear state and federal policies in favor of arbitration, the commission agrees with Hawaiian Telcom that, commission precedent in Docket No. 03-0027 compels arbitration and thus dismissal of the Formal Complaint in this docket.

As a practical matter, this result makes sense since the Formal Complaint was indisputably filed under the First Agreement. Thus, even if the commission were to deny the Motion to Dismiss on the basis that the Second Agreement applies to this dispute, the commission would still have to construe the terms of the First Agreement in order to adjudicate the claims in the Formal Complaint. PLNI, in fact, acknowledges this in its Supplemental Reply Brief:

We agree that, to the extent a dispute somehow exists—despite [Hawaiian Telcom's] express waiver of its right to lodge a dispute—as between the [First] Agreement and [Second] Agreement, the [First] Agreement would govern the substance of the dispute, since the trunking and billing arrangements were established under the [First] Agreement.<sup>34</sup>

PLNI, however, simultaneously argues that the arbitration clause in Section 25.1 of the First Agreement "no longer exists, and was replaced" by the dispute resolution provision in the Second Agreement.<sup>35</sup> PLNI cannot have it both ways; an absurd result could follow if the commission is forced

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<sup>34</sup>PLNI's Supp. Reply, at 2.

<sup>35</sup>See PLNI's Supp. Brief, at 8.

to pick and choose terms out of both agreements to apply to this dispute.

Based on the several legal authorities discussed above, the strong state and federal public policies favoring arbitration, and the practical reasons supporting application of the First Agreement to the allegations in the Formal Complaint, the commission concludes that Hawaiian Telcom's Motion to Dismiss should be granted, and the Parties must arbitrate their dispute under Section 25.1 of the First Agreement.<sup>36</sup>

B.

PLNI's Omnibus Cross-Motion

Because the commission is dismissing the Formal Complaint on jurisdictional grounds, it denies, in toto, PLNI's Omnibus Cross-Motion.

III.

Orders

THE COMMISSION ORDERS:

1. Hawaiian Telcom's Motion to Dismiss is granted, and PLNI's Formal Complaint is dismissed without prejudice.

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<sup>36</sup>To the extent Count IV in the Formal Complaint (PLNI's request for an investigation under HAR § 6-61-71) may arguably be construed independently from PLNI's compensatory claims in Counts I - III, and not subject to Section 25.1 of the First Agreement, the commission finds that there is insufficient evidence in the record to support Count IV. The commission further notes that Hawaiian Telcom's service quality is the subject of Docket No. 2006-0400.

2. The Parties shall engage in the alternative dispute resolution procedures described in the First Agreement.

3. PLNI's Omnibus Cross-Motion is denied.

4. This docket is closed unless otherwise ordered by the commission.

DONE at Honolulu, Hawaii APR - 4 2008.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By John E. Cole  
John E. Cole, Commissioner

By Leslie H. Kondo  
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

Kaiulani Kidani Shinsato  
Kaiulani Kidani Shinsato  
Commission Counsel

2006-0450.eh

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served a copy of the foregoing Decision and Order No. 24124 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: APR - 4 2008